IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 19, 2008 Session

STATE OF TENNESSEE v. STANLEY M. ZELEK, II

Appeal from the Criminal Court for Wilson County
No. 06-0517 John D. Wootten, Jr., Judge

No. M2007-01776-CCA-R3-CD - Filed April 3, 2009

The defendant, Stanley M. Zelek, II, was convicted by a jury in the Criminal Court for Wilson County of driving under the influence (DUI), a class A misdemeanor. After he waived his right to have a jury determine whether he had prior DUI convictions, the court convicted him of third offense driving under the influence. The defendant received a sentence of eleven months and twenty-nine days consisting of 300 days' incarceration, 120 of which to be served day-for-day, and sixty-four days' probation. The defendant waived his right to have a jury determine the amount of the fine for his conviction, and the trial court set a fine of $1100 and revoked the defendant's driver's license for five years. The court also determined that the defendant violated the implied consent law and revoked his license for one year. On appeal, the defendant contends: (1) the trial court erred in determining that the defendant was neither "stopped" nor "seized" by the arresting officer; (2) the trial court erred in denying the defendant's motion to suppress regarding the seizure giving rise to the charges; and (3) the trial court erred in taking judicial notice of a city ordinance and basing its denial of the suppression motion on this ordinance. We affirm the judgment of conviction, but we remand the case for the trial court to correct the implied consent license suspension to two years pursuant to Tennessee Code Annotated section 55-10-406(a)(4)(A)(ii) (Supp. 2003).

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part and Case Remanded

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Michael Clemons, Lebanon, Tennessee, for the appellant, Stanley M. Zelek, II.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General, Tom P. Thompson, Jr., District Attorney General; Linda D. Walls, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the trial, the State presented the videotape shown in the suppression hearing and Lebanon Police Officer David Willmore's testimony, which corresponded to his testimony at the suppression hearing. The defendant presented the testimony of the emergency room physician who examined the defendant after his booking. The physician testified that the defendant was not intoxicated when the defendant was at the emergency room from 3:40 a.m. until 6:40 a.m.

At the suppression hearing, Officer Willmore testified that on February 4, 2006, he was patrolling an area in which two bars were located and in which he had made several drug, alcohol, and gun arrests. He said that during his ten-year career in law enforcement, he had received training on DUI detection early in his career and again in 2007. He said a dark car attracted his attention early that morning by parking in the intersection of Mimosa and Joseph Streets. He stated that the car was parked "some distance" from the side of the road. He said that he "had received complaints" about cars blocking the road and that the fire department had told the police department about difficulties in maneuvering around cars that had been parked in the road and had blocked access for emergency vehicles. He continued, "[A]nytime I would see a car parked in that area, I would usually tell the driver to move, and that also would give me a chance to have a casual encounter with the people to . . . see what they were doing in that area." He said that although the driver got out of the car and went into a nearby house, the passenger saw the officer when getting out of the car and got back into the car. He stated that a hedge lined the road and that the parked car's passenger door was opened but did not touch the hedge.

The officer said he parked his squad car approximately twenty to twenty-five feet behind the parked car. He stated that he left his headlights on, that he turned on his squad car's video recorder, and that he got out of the car to speak with the passenger. He said he asked the passenger where the driver went, as he needed the driver to move his car. He stated the videotape recorded the entire encounter, from the initial walk to the car to the conversation at the house with the defendant. He said he remembered that the encounter occurred "late at night" but did not remember the specific time. He stated that he spoke with two people at the house before the defendant came to the door. He said he recognized this man as the driver because he wore the same orange shirt as the driver.

After viewing the squad car videotape that was admitted into evidence, Officer Willmore testified he saw the car park between 1:35 and 2:00 a.m. He said that the car parked on the road and not in any of the available parking areas at the dead ends of each intersecting street. He said that he had past experiences asking people to move their cars parked at the corner of Mimosa and Joseph Streets because the cars blocked the intersection. In response to counsel's question whether he investigated the parked car based on his gun arrests in the area, knowledge of arrests made by other officers, and his DUI detection training, Officer Willmore stated that he thought the investigation was going to involve drugs.

On cross-examination, Officer Willmore estimated that he had either made or seen thirty to forty drug arrests in the Mimosa-Joseph street vicinity. He asserted he made gun arrests in

approximately ten-percent fewer occasions. He said that the bulk of the thirty to forty drug arrests were made outside the bars, including in their parking lots. He stated that as he was driving, he saw the driver leave the car, look at the police officer, and then walk around the front of the parked car to go to the house. He said the passenger started to get out, saw the officer driving up behind the car, and decided to get back into the car. He said that the way the dark car had been parked would have prevented another car from turning left from Joseph Street onto Mimosa Street. Explaining what was wrong with the manner of parking, the officer stated that Lebanon had a city ordinance prohibiting parking greater than eighteen inches from a curb and that in the past, the police have had to ask people in that area to move cars blocking the street.

Officer Willmore testified that the distance between the patrol car and the driver walking into the house precluded him from simply shouting to the driver to move the car. The officer said he was uncomfortable turning his back on the passenger, who remained in the car, to pursue the driver while no other officer was present to watch the passenger. Officer Willmore stated that after speaking with the passenger, who admitted having been drinking, he did not ask the passenger to move the parked car, although the keys were in the car. However, he conceded that without having performed a sobriety test, he could not know whether the passenger had indeed been intoxicated. He stated that the parking ticket he had also issued to the defendant that night had been dismissed. He could not specify the distance between the hedge and the parked car except to say that it approximated a car door's length. He stated that it was standard procedure for the department to turn on recording equipment for all encounters.

Officer Willmore testified he thought he needed to investigate what was happening in view of the late hour, the car being parked far from the edge of the street, the driver seeming to be in a hurry, and seeing the driver look at him and then walk toward a house, while the passenger saw him and got back into the parked car. He acknowledged that he did not initially tell the passenger, who asked him what had happened, that the car was illegally parked. Rather, he stated he talked to the passenger for several minutes and recounted the odd circumstances because the passenger had not been the driver. He said the passenger changed his relationship to the person they were visiting in the house several times. Officer Willmore said he asked the passenger questions to which the officer already knew the answer to elicit information from the passenger. In response to the trial court's questioning, the officer stated that the lines on the street that were visible in the videotape were the dividing lines, near which the driver had parked the car.

The videotape reflected that the passenger stepped out of the car and that he told the officer several times that he and the defendant were visiting various people. The officer and the passenger continued their conversation, and the officer at some point told the passenger to sit down in the car and to leave the car door open. The officer stood between the open door and the passenger and blocked his way. The officer asked the passenger if the driver had gone into the house to obtain or use drugs. The passenger said he did not know the defendant's last name although he claimed to have known him for an extended period of time. Another officer arrived at the scene and blocked the passenger's exit from the car to allow Officer Willmore to pursue the driver. Officer Willmore gave the passenger's identification card to this second officer. Before leaving, Officer Willmore told

the passenger that he saw the driver get out of the car, look at the officer, and then go inside; that he saw the passenger try to get out of the car and get back inside after he saw the officer; and that the passenger did not know the driver's last name and gave several different reasons why they drove to the house. The tape also shows the position of the car on the road, including what appears to be a solid dividing line with passing zone markings to the left of the officer standing next to the defendant's car.

The videotape showed that when the defendant came to the house door, his speech was very slurred. He did not enunciate during the entire taped segment. He denied having drunk anything intoxicating. After the officer said he recognized the defendant as the driver because of his orange shirt with stripes, the defendant stated he just got out of his car and came inside. He appeared disoriented, although he was holding a lit cigarette, which he threw away at the officer's request. The officer stated that the defendant's eyes were glassy and bloodshot and that he detected an odor of alcohol on the defendant. The defendant said he did not drink anything while he was in the house.

The videotape showed that after Officer Willmore asked the driver the day and date, the officer told him to lift his shirt and to turn around to reveal his waistline. The officer felt the driver's pants pockets. The defendant said he was illiterate, and his description of his job was unintelligible other than the phrase "switch out." The officer turned on a light in his car to illuminate his and the defendant's face. The defendant said that he drank two to three beers "up the road" and that he was visiting a friend. The officer told him that because he was illegally parked and smelled of alcohol, the officer would subject him to sobriety tests. These consisted of the four-finger-touch, walking in a straight line, standing on one foot while elevating the other leg, and an eye test. The tape showed the defendant performing the tests. He stated he had scoliosis, and he unsuccessfully attempted the standing-on-one-foot test and had difficulty with the turning on the straight line test. After a long section with only static as sound, the officer handcuffed the defendant and placed him into the squad car's backseat. He turned the camera around to face the defendant for the reading of the implied consent form. Although the defendant blurted responses to other questions, he did not verbally give or refuse consent. The officer stated that he would interpret this behavior as a refusal. The jury found the defendant guilty of driving under the influence of alcohol, a Class A misdemeanor.

THE NATURE OF THE ENCOUNTER (ISSUES 1 AND 2)

At the suppression hearing, the trial court held that in the totality of circumstances there was no "stop," given the officer's testimony about the position of the car and the municipal ordinance prohibiting parking more than eighteen inches from the curb. The court also based its decision on two statutes, Tennessee Code Annotated sections 55-8-160 and 55-8-158, that, it claimed, when read together would prohibit parking in a roadway intersection. The trial court denied the defendant's motion to suppress.

Relying on factors presented in State v. Daniel, 12 S.W.3d 420 (Tenn. 2000), the defendant contends that the confrontation between the police officer and the defendant became a "seizure" because the defendant and passenger did not feel free to leave, the officer pursued the defendant into a house, the officer took the passenger's identification to obtain a records check, the officer called for backup officers, and the officer ordered the passenger to remain seated in the car during the interrogation. The defendant asserts that even if this encounter were a proper stop, the manner of the officer's investigation was unreasonable because his actions were not reasonably related in scope to the circumstances justifying the investigatory stop. The defendant asserts the officer suspected a drug crime but used a parking violation to investigate.

The State responds that the officer's approach to the parked car was not a "seizure" subject to the Fourth Amendment or Article I, section 7 of the Tennessee Constitution but instead a brief citizen-police encounter. The State analogizes its argument to the situation in State v. Hawkins, 969 S.W.2d 936 (Tenn. Crim. App. 1997), where this court found an officer had reasonable suspicion to investigate an "awkwardly parked" car and saw a powdered substance in plain view. The State argues alternatively that if the encounter were "something more than" a citizen-police encounter, the evidence preponderates in favor of the trial court's determination that the officer had reasonable suspicion to investigate in view of the late hour, the position of the vehicle, and the behavior of the passenger and defendant after noticing the approaching officer.

On review, an appellate court may consider the evidence adduced at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. State v. Henning, 975 S.W.2d 290, 297-99 (Tenn. 1998). A trial court's factual findings in a motion to suppress hearing are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). The application of the law to the facts as determined by the trial court is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

Our supreme court has outlined the three types of encounters between the authorities and citizens and defined the applicable legal standard for each:

> Not all contact between police officers and citizens involves the seizure of a person under the Fourth Amendment of the United States Constitution or Article I, section 7 of the Tennessee Constitution. Courts have recognized three distinct types of police-citizen interactions: (1) a full scale arrest which must be supported by probable cause, see United States v. Watson, 423 U.S. 411, 424 (1976); (2) a brief investigatory detention which must be supported

> by reasonable suspicion of criminal activity, see Terry v. Ohio, 392 U.S. 1, 27 (1968); and (3) a brief "consensual" police-citizen encounter which requires no objective justification, see Florida v. Bostick, 501 U.S. 429, 434 (1991). This last category includes community caretaking or public safety functions. See Cady v. Dombrowski, 413 U.S. 433, 441 (1973); State v. Hawkins, 969 S.W.2d 936, 939 (Tenn. Crim. App. 1997).

State v. Williams, 185 S.W.3d 311, 315 (Tenn. 2006).

We recognize that reasonable suspicion of criminal activity is not required for a police officer to approach a vehicle parked in a public place and to request the driver's identification and registration documents. See, e.g., State v. Williams, 185 S.W.3d 311, 315 (Tenn. 2006); State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993). However, a consensual citizen-police encounter is elevated to a seizure when the officer through physical force or show of authority restrains the citizen of his liberty. Williams, 185 S.W.3d at 316; Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968). If the citizen would not, in view of the totality of the circumstances, feel free to leave, a seizure has occurred. Williams, 185 S.W.3d at 316, see United States v. Mendenhall, 446 U.S. 544, 554 (1980).

In determining whether the officer's conduct amounted to a seizure, we consider "all the circumstances surrounding the encounter to determine whether police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter." Id. at 425 (citing Florida v. Bostick, 501 U.S. 429, 440 (1991)). If the police-citizen encounter constitutes a seizure, the officer must have "a reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been, or is about to be, committed." State v. Moore, 775 S.W.2d 372, 377 (Tenn. Crim. App. 1989) (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)). In determining whether an officer's reasonable suspicion is supported by specific and articulable facts, "a court should consider the totality of the circumstances—the entire picture." Moore, 775 S.W.2d at 377 (citations omitted).

Our supreme court has said that a person who is in a parked vehicle is seized when a police officer exhibits a show of authority by activating his blue lights. Williams, 185 S.W.3d at 316-17; cf. State v. Gonzalez, 52 S.W.3d 90 (Tenn. Crim. App. 2000). "'Few, if any, reasonable citizens, while parked, would simply drive away and assume that the police, in turning on the emergency flashers, would be communicating something other than for them to remain.'" Id. (quoting Lawson v. State, 120 Md. App. 610, 707 A.2d 947, 951 (Md. Ct. Spec. App. 1998)). That said, our supreme court has also recognized:

> Not all use of the emergency blue lights on a patrol car will constitute a show of authority resulting in the seizure of a person. We realize that when officers act in their community caretaking function, they may want to activate their emergency equipment for their own safety and the safety of other motorists.

Id. at 318, 707 A.2d 947.

Although a trial court's factual findings for a suppression motion are conclusive on appeal unless evidence preponderates against them, the trial court did not make an extensive finding of fact in denying the motion. Thus, we review the application of law to the evidence de novo. See State v. Yeargan, 958 S.W.2d at 629 (citation omitted).

The evidence presented at the suppression hearing showed that the defendant parked his car in the intersection of two streets in the early hours of February 4, 2006, and that Officer Willmore observed this. The officer noted that the defendant's car blocked the roadway and that the open passenger-side door did not touch the hedge lining the road. The officer testified the defendant parked his vehicle in contravention of a local ordinance prohibiting parking more than eighteen inches from a curb. At this point, the officer had probable cause that a parking violation had occurred and could make a constitutional stop of the car. See State v. Cox, 171 S.W.3d 174, 181 (Tenn. 2005). The officer, knowing he had just observed this parking violation, saw the driver leave the car and walk toward a residence behind a hedge. The car's passenger attempted to leave the car but appeared to think better of it when he saw the patrolling officer. The officer testified that he thought this odd behavior merited further investigation while he had probable cause to believe the parking violation had occurred. While trying to find the driver to move the car from the intersection, Officer Willmore learned that the passenger had been drinking and was an unsuitable candidate to move the car. The passenger also gave the officer differing reasons for being in the vicinity, one known to the officer as one for drug and weapons arrests in addition to one having a history of parking problems blocking access to emergency vehicles. Armed with these facts, the officer followed the path of the driver toward the house to find the driver. When the defendant came to the door, the officer recognized him because of his bright shirt–the one he had seen the driver wearing–and saw that his eyes were glassy and bloodshot. The defendant agreed that he had just left his car and had entered the house. The defendant said he had not imbibed at the house, and he had extremely slurred speech. This was all in plain view for the officer while he had probable cause to believe a parking violation had occurred. At this point, the officer additionally had the reasonable suspicion that he had just seen the defendant drive while intoxicated. As in Terry, the officer had the need to investigate further—in this case, by subjecting the defendant to a brief investigatory detention to perform sobriety tests. In view of the defendant's performance on these tests, in addition to his physical traits and the officer's observation of the defendant's driving, the officer had probable cause to arrest the defendant for driving under the influence.

We agree with the State that State v. Hawkins, 969 S.W.2d 936 (Tenn. Crim. App. 1997), is analogous to the present situation. There, a police officer saw an "awkwardly parked" car on a public road, and a woman drinking beer was talking to the man sitting in the car. The officer parked the car behind the "awkwardly parked" car, walked to the other car, and noticed an open beer can between the seated man's legs and a plastic bag containing a powder. Id. at 937-38. The officer saw something meriting investigation, and while investigating, the officer developed reasonable suspicion of another offense. Id. at 939. This situation is similar to the present case, in which the officer actually had seen a parking violation occur, investigated to have the car moved, and developed

reasonable suspicion the driver had been driving under the influence. The defendant is not entitled to relief on this issue.

JUDICIAL NOTICE

The defendant asserts that the court improperly took judicial notice of the Lebanon parking ordinance, on which, the defendant claims, it based its denial of the motion to suppress. The defendant argues judicial notice of the ordinance should not have been taken because the State did not request the trial court to take judicial notice and did not give notice to the defendant, both of which are prerequisites for judicial notice under Tennessee Rule of Evidence 202(b). The State replies that the trial court properly denied the suppression motion because (1) the confrontation was not a seizure and (2) even if the confrontation were something more than a brief police-citizen encounter, it was still based on the officer's reasonable suspicion to investigate the defendant.

The suppression hearing transcript shows the trial court did not base its determination of the encounter on an ordinance. Although it mentioned the officer's testimony about an ordinance and the distance between the car and the hedge, the trial court stated that "the critical fact" was the position of the car on the road. The trial court supported its determination using Code sections 55-8-158 and 55-8-160, which state in pertinent part:

> (a) No person shall stop, stand or park a vehicle outside of the limits of an incorporated municipality . . . in any of the following places:
> (3) Within an intersection[.]

T.C.A. § 55-8-160(a)(3) (2006).

> (a) Upon any highway outside of a business or residential district, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of the highway, but in every event an unobstructed width of the highway opposite a standing vehicle of not less than eighteen feet (18') shall be left for the free passage of other vehicles . . . .

T. C. A. § 55-8-158(a) (2006). Pursuant to Rule 202(a) of the Tennessee Rules of Evidence, the trial court was required to take judicial notice of these Tennessee statutes. Brimmer v. State, 29 S.W.3d 497, 525 (Tenn. Crim. App. 1998) (holding that Tennessee courts are required to take judicial notice of the statutes of all states, territories, and jurisdictions of the United States). The court "does not [have] to admit into evidence any law or regulation of which the court has taken judicial notice." Philip Latiff v. Tracy W. Dobbs, M.D., No. E2006-02395-COA-R3-CV, Knox County, slip op. at 6 (Tenn. Ct. App. Jan. 29, 2008). The defendant is not entitled to relief.

Although not raised by either party, we note that the trial court suspended the defendant's driver's license for one year for the implied consent violation. The law, however, requires a suspension for two years when the defendant has prior DUI convictions. T.C.A. § 55-10-406(a)(4)(A)(ii) (Supp. 2003). The defendant had notice of this heightened civil penalty. First, the arresting officer read the defendant the implied consent form, which apprised the defendant of the durations of the license suspension pertinent to his case (either one or two years because there was no claim of accident with bodily injury or accident in which someone was killed.) Id. The defendant signed this form to confirm his refusal to submit to testing. Second, the indictment stated the implied consent statute number. Third, the indictment used an enhanced count alleging the defendant had two prior DUI convictions, such that the defendant had notice of the enhanced penalty for violators of the implied consent law with certain prior convictions. After the trial court found the defendant to have been convicted of prior DUI offenses, it was required to suspend the defendant's license for his violation of the implied consent law for two years. Id. (requiring that the court disposing of the charge for which the defendant was arrested must determine whether the defendant violated the implied consent law "at the same time" it adjudicates the DUI).

Based upon the foregoing and the record as a whole, we affirm the judgment of conviction, but we remand the case to the trial court for correction of the implied consent violation judgment to a two-year suspension, pursuant to Tennessee Code Annotated section 55-10-406(a)(4)(A)(ii) (Supp. 2003), in view of the trial court's finding of the defendant's two prior DUI convictions.

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JOSEPH M. TIPTON, PRESIDING JUDGE